85-1750

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

THE STATE OF TEXAS,

Petitioner,

vs.

RONALD GERALD ADLEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Does the phrase "receive a bet" in the Texas gambling promotion statute, when measured by common understanding and practice, provide adequate warning and fair notice to persons of ordinary intelligence as to what conduct is proscribed?

II.

Is the phrase "receive a bet" in the Texas gambling promotion statute, when measured by common understanding and practice, sufficiently distinct from the phrase "make a bet" in the lesser offense of gambling so as to prevent arbitrary arrests and convictions?

LIST OF PARTIES

Ronald Gerald Adley,

Appellant below and Respondent herein

The State of Texas,

Appellee below and Petitioner herein

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No. .....

In The

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October Term, 1985

THE STATE OF TEXAS,

Petitioner,

vs.

RONALD GERALD ADLEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas entered in this proceeding on November 6, 1985. The State's first motion for rehearing was denied on February 26, 1986. For clarity, reference to the petitioner is by "State" and reference to the respondent is by "Defendant" or "Adley".

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, not yet reported, appears in the appendix as *Adley v. State*, No. 0786-84 (Tex. Crim. App. November 6, 1985). The appendix includes the majority opinion on Adley's

petition for discretionary review to the Texas Court of Criminal Appeals as well as the dissenting opinion thereto. No opinion was issued on denial of the State's motion for rehearing. A copy of that order appears in the appendix along with an opinion dissenting to denial of the motion without written opinion.

JURISDICTION

The opinion of the Court of Criminal Appeals holding TEX. PENAL CODE § 47.03(a)(2) unconstitutional was entered on November 6, 1985. On February 26, 1986, the Court overruled the State's timely filed motion for rehearing. The State sought a second motion for rehearing by requesting a suspension of the normal rules of appellate procedure. *See* Tex. Cr. App. R. 4. The Court denied leave to file this motion; however, the State has not used this second motion in calculating the time available for filing this petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. XIV, § 1, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEX. PENAL CODE ANN. § 47.03(a)(2) (Vernon 1974).

TEX. PENAL CODE ANN. § 47.02(a)(1) (Vernon Supp. 1986).

TEX. PENAL CODE ANN. § 47.01(1) (Vernon 1974).

The text of the above statutes appears in the appendix.

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STATEMENT OF THE CASE

Ronald Gerald Adley was convicted in a state district court of the felony offense of gambling promotion, TEX. PENAL CODE § 47.03(a)(2). Adley pleaded not guilty before the trial court, which found him guilty based on stipulated evidence. The court assessed punishment at three years' probation. The facts of the case are not disputed; the sole issue is the constitutionality of the statute under which Adley was convicted.

Adley challenged the constitutionality of § 47.03(a)(2) prior to trial by motion to quash. Appendix App. 15-16. This motion was denied. On direct appeal, Adley raised an indirect challenge to the statute, arguing that the felony gambling promotion and misdemeanor gambling statutes could be harmonized only by a holding that a preexisting bet between other parties was necessary to convict the third party who received the bet for gambling promotion.

The court of appeals rejected this argument and held that § 47.03(a)(2) was not unconstitutionally vague. *Adley v. State,* 675 S.W.2d 240 (Tex. App.—Dallas 1984).

On petition for discretionary review to the Texas Court of Criminal Appeals, Adley advanced the same indirect challenge. That Court also rejected his argument but otherwise held § 47.03(a)(2) unconstitutionally vague and unenforceable. *Adley v. State,* No. 0786-84 (Tex. Crim. App. November 6, 1985). Specifically, the Court held that no discernible difference existed between the misdemeanor offense of gambling and the felony offense of gambling promotion; therefore, a person in Adley's position would be subject to felony or misdemeanor charges for the same basic conduct, apparently at the whim of the prosecutor. *Id.,* and see appendix App. 8. A more detailed analysis of Texas gambling law appears in the argument under the reasons for granting the writ.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With The Decisions Of The Tenth Circuit Court Of Appeals And The Oklahoma Court Of Criminal Appeals As To The Constitutionality Of An Almost Identical Gambling Promotion Statute.

The Texas Court of Criminal Appeals, the stat. court of last resort for criminal appeals, has declared a state penal state, TEX. PENAL CODE ANN. § 47.03(a)(2) (Vernon 1974), proscribing gambling promotion, uncon-

stitutionally vague and unenforceable. As such, this decision conflicts with the decisions of the Tenth Circuit Court of Appeals and the Oklahoma Court of Criminal Appeals, another state court of last resort, holding an almost identical gambling promotion statute constitutional, OKLA. STAT. tit. 21, § 982 (West 1983). *United States v. Hines,* 696 F.2d 722 (10th Cir. 1982); *State v. Koo,* 647 P.2d 889 (Okla. Crim. App. 1982). Therefore, review by this court is proper on writ of certiorari. 28 U.S.C. § 1257 (3); Sup. Ct. R. 17.1(b). This conflict arises because the Texas Court of Criminal Appeals has refused to follow traditionally applied rules of constitutional analysis as set out by this Court.

Before exploring this conflict, however, it is necessary to say a few words about the Texas statutory scheme of punishing commercial gambling. The making of a bet on the partial or final result of a game or contest constitutes the misdemeanor offense of gambling.[1] TEX. PENAL CODE § 47.02(a)(1) (Vernon Supp. 1986). A person who receives, records or forwards a bet or offer to bet commits the felony offense of gambling promotion. TEX. PENAL CODE § 47.03(a)(2). This statute is aimed at the professional gambler or bookie. Searcy and Patterson, *Commentary on the Texas Penal Code,* 4 TEX. PENAL CODE ANN. §47.03 (Vernon 1974). The term "bet" is defined by statute, TEX. PENAL CODE ANN. § 47.01(1) (Vernon 1974); however the term "receives" in § 47.03 is not.

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[1] A defense to this statute, though not relevant here, applies to the "social gambler." TEX. PENAL CODE § 47.02(b)(1)-(3).

Adley was charged with receiving a bet on the final result of a football game pursuant to § 47.03(a)(2). There is no dispute about the facts of this case; in fact, Adley was convicted on stipulated evidence.

The analysis of the Texas Court of Criminal Appeals, while truncated and erroneous, is nevertheless clearly based on federal constitutional law.[2] The opinion first restates the standard established by this Court for judging claims of statutory vagueness, citing *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) and *United States v. Harris,* 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.2d 989 (1953). Rather than directly address the challenged statute, however, the Court constructs a hypothetical wherein the accused's conduct allegedly constitutes either misdemeanor gambling or felony gambling promotion, apparently chargeable as either offense at the whim of the prosecutor. Then, without elaboration, the Court asserts that Adley is in the same position as the hypothetical accused. Accordingly, the Court holds § 47.03(a)(2) unconstitutional because "due process prohibits such vagueness and arbitrariness." *Adley,* No. 0786-84 *slip op.* at 6-7.

The conflicting opinions in *State v. Koo,* 647 P.2d 889 (Okla. Crim. App. 1982) and *United States v. Hines,* 696 F.2d 722 (10th Cir. 1982), demonstrate how the Texas Court of Criminal Appeals has misapplied accepted principles of constitutional analysis in dealing with similar penal statutes.

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[2] Appellant squarely implicated the United States Constitution in his motion to quash the indictment. See appendix App. 15-16; *Cf., Raley v. Ohio,* 360 U.S. 423, 436-437, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959).

The Oklahoma gambling promotion statute is virtually identical to its Texas counterpart, punishing the receiving, recording or forwarding of bets or offers to bet. OKLA. STAT. tit. 21, § 982. The Court in *State v. Koo*, 647 P.2d 889, considered a similar contention, that the state gambling promotion statute was unconstitutionally vague and that the statute's failure to define "receive" made it impossible to determine who was criminally liable. The Court found no vagueness or ambiguity, and held that "the term 'receive' is clearly understood by all."[3] 647 P.2d 891. It should be noted that the Oklahoma Court, unlike the Texas Court of Criminal Appeals, began with the presumption that the statute was constitutional and, if possible, should be construed so as to uphold its constitutionality. *Id.*[4]

In *United States v. Hines*, 696 F.2d 722, the defendants were charged with conspiring to use interstate travel and facilities to further an Oklahoma bookmaking operation which was illegal under Oklahoma commercial gam-

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[3] This opinion discusses both state and federal Constitutional principles. The Tenth Circuit correctly held that this opinion did not distinguish between state and federal Constitutional standards. *United States v. Hines*, 696 F.2d 722, 725 n. 2 (10th Cir. 1982).

[4] The Court also considered a claim similar to that advanced in *Adley*—harmonization of the gambling statutes. The defendants in *Koo* argued that § 982 was so broad in scope and vague in application that it was impossible to reconcile with gambling statutes already in existence. The Oklahoma Court of Criminal Appeals ultimately rejected this claim on grounds of statutory interpretation, but also held that the defendants had failed to show that this asserted constitutional defect applied to them, citing *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). *See State v. Koo*, 647 P.2d at 893.

bling laws. *See* 18 U.S.C. §§ 371, 1952. Because the defendants' convictions could have been based on using interstate means to violate tit. 21, § 982, it was necessary to determine the constitutionality of that statute if the convictions were to be upheld. 696 F.2d at 726; *Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed 1122 (1931).

The defendants in *Hines* raised three vagueness and overbreadth challenges to § 982. As relevant to the present case, the defendants asserted that this section was vague because the words used were susceptible of various interpretations. The Tenth Circuit rejected this argument, noting that the terms (unspecified) cited by the defendants were either defined by statute or possessed a common and ordinary meaning which clearly defined its scope. The Court held that § 982 was set out in terms that an ordinary person exercising common sense could understand and comply with. In any event, the Court held that the statute was not vague as it pertained to the defendants' conduct; there was no suggestion that the statute failed to inform the defendants that their conduct was proscribed and they lacked standing to attack the statute because it might be unconstitutionally vague as applied to the conduct of others. 696 F.2d at 727.[5]

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[5] The Court also took note of the following maxims of constitutional interpretation: (1) vagueness challenges to statutes which do not involve first amendment rights are limited to the facts at hand, *United States v. Mazurie,* 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975) and (2) one whose conduct is clearly covered by the statute at bar may not successfully challenge it for vagueness. *Parker v. Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

Besides the problem that arises when different states interpret uniform penal statutes in radically different ways (an issue addressed more fully *infra*), the *Hines* case raises interesting implications for possible federal racketeering prosecutions. Before a prosecution for this offense can be had, it is necessary that the state gambling statute be constitutional. Otherwise, a successful constitutional challenge will vitiate the ultimate conviction. If the state court of last resort has held its gambling statute unconstitutional on federal constitutional grounds, prosecution might well be deterred, even though the state court's opinion would not be binding on the federal district court or the circuit court of appeals. If such a prosecution were had in Texas, the following anomalous situation might result; the Texas gambling promotion statute would be unconstitutional as to *state* prosecutions but not as to *federal* prosecutions for using interstate means to violate that particular statute. The State of Texas submits that this Honorable Court should review the present case and correct the mistaken constitutional analysis inherent in the Texas Court of Criminal Appeals' decision.

II.

The Decision Below Conflicts With The Decision Of The Wisconsin Supreme Court As To The Constitutionality Of An Almost Identical Gambling Promotion Statute.

The Texas Court of Criminal Appeals held that "receiving" a bet, a felony by virtue of § 47.03, was insufficiently distinguishable from the misdemeanor offense of "making" a bet, § 47.02(a)(1). Thus, § 47.03(a)(2) was unconstitutionally vague for failing to make a clear dis-

tinction between the conduct required to commit the felony and misdemeanor offenses. This argument is answered by the conflicting opinion of the Supreme Court of Wisconsin, another state court of last resort, in *State v. Vlahos*, 50 Wis.2d 609, 184 N.W.2d 817 (Wis. 1971).

In Wisconsin, the same statutory scheme applies. Making a bet is a misdemeanor, WIS. STAT. ANN. §945.02(1) (West 1982). The felony gambling promotion statute, WIS. STAT. ANN. § 945.03(2) (West 1982), punishes anyone who intentionally "receives, records or forwards bets or offers to bet." Vlahos contended that § 945.03(2) was unconstitutionally vague because it purportedly punished only the repeated making of misdemeanor bets; indeed, it was his ultimate contention that "making" a bet and "receiving" a bet were the same thing within the meaning of these sections. 184 N.W.2d 820. The Court rejected this contention, noting that:

> The distinction between making a bet and receiving bets (or offers to bet) would seem to be well enough understood in common parlance as the distinction between the conduct of the casual social bettor and the conduct of one engaged in the systematic acceptance or rejection of bets made by a bettor, casual or otherwise. By definition, the word "receive" connotes the acceptance or taking possession of delivery of something,—in this case a bargain, as defined in sec. 945.01(1). The distinction is certainly well enough known to those persons whose conduct would fall within the purview of these sections. They are commonly known as bookmakers or their agents.

Id. at 820-821. Accordingly, the Court held:

> [W]hen the language of sec. 945.03(2), Stats., is measured by common understanding and practice it does give adequate warning of what conduct it proscribes, and the intent of the section establishes reasonably distinct boundaries for its application and, as such, is not unconstitutional because of vagueness.

Id. at 821.[6] With this opinion as well, it should be noted that the Court began with the presumption that the statute was constitutional and that, if possible, the Court should construe this law so as to uphold its constitutionality. *Id.* at 819, 821.

Vlahos, then, provides the resolution to the problem raised by the Texas Court of Criminal Appeals. Making a bet and receiving a bet are not the same thing. By definition, receiving a bet connotes acceptance, taking possession or exercising custody and control over the wager. This distinction is well enough evident to those persons whose conduct falls within the ambit of the Texas gambling promotion statute.

For purposes of review by certiorari, however, it is not enough to say that the Texas Court of Criminal Appeals' opinion is wrong—although it certainly constitutes a disturbing departure from commonly accepted principles

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[6] The opinion is clearly grounded in principles of federal constitutional interpretation.

of constitutional analysis.[7] Rather, the conflict between Texas and Oklahoma and Wisconsin must be examined to be determined what implications this divergence has for the desirability of review by this Court.

Seven states have similar or nearly identical gambling promotion statutes: Georgia [GA. CODE ANN. § 16-12-22 (1984)]; Kansas [KAN. STAT. ANN. § 21-4304

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[7] An analysis of the *Adley* opinion reveals that the following principles of federal constitutional analysis were disregarded:

(a) Courts should begin with the presumption that a statute is constitutional. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.20 130 (1962).

(b) Courts should seek an interpretation which supports the constitutionality of legislation. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1962).

(c) Vagueness challenges to statutes which do not involve first amendment freedoms are limited to the facts of the case at hand. *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975).

(d) One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

(e) A person to whom a statute may constitutionally be applied may not be heard to challenge the statute on the grounds that it may conceivably be applied unconstitutionally to others, in situations not before the Court. *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

(f) Language which may otherwise render a statute vague may be considered to have a sufficiently definite meaning because of its common usage or understanding. *Scales v. United States*, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed. 2d 782 (1961).

While the ultimate holding of the Court of Criminal Appeals may be debatable, with respect to the mode of constitutional analysis, the Court came nowhere near the mark.

(1981)]; Minnesota [MINN. STAT. ANN. § 609.76(6) (West Supp. 1986)]; New Mexico [N.M. STAT. ANN. § 30-19-3 (1978)]; Pennsylvania [18 PA. CONS. STAT. ANN. § 5514(3) (Purdon 1983)]; Wisconsin [WIS. STAT. ANN. § 945.03 (West 1982)] and Texas [TEX. PENAL CODE ANN. § 47.03 (Vernon 1974)]. As shown in this petition, three states have examined the constitutionality of their gambling promotion statutes; Oklahoma and Wisconsin have held their statutes constitutional, while Texas has held otherwise. There is nothing unique to state constitutional law about any of these decisions. The real question in each case was whether the challenged statutes met due process standards of certainty and definiteness—matters of fourteenth amendment law. Accordingly, there is very little reason for a conflict to exist between these states on the same federal question.[8]

One of the benefits of uniform statutes is that, since they are usually the work of committees of scholars, they provide superior clarity and definition of crimes and penal sanctions. These statutes also provide the benefits of, as much as is humanly possible, uniform application

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[8] Consider the following hypothetical if the *Adley* opinion is allowed to stand: A, a professional gambler in Oklahoma City, receives a $75,000 bet on the annual Texas-Oklahoma football contest. Realizing that he has overextended himself with this and other bets, A "lays off" the $75,000 bet with B, a professional gambler in Dallas, Texas. A can be successfully prosecuted in Oklahoma for receiving a bet because, as a matter of federal constitutional law, the state gambling promotion statute gives him adequate notice of what conduct is proscribed. B, on the other hand, cannot be prosecuted in Texas for the same offense because his state court holds, as a matter of federal constitutional law, that the state gambling promotion statute does not provide adequate notice of the conduct proscribed.

and interpretation. An important corollary to this proposition is that identical statutes should be uniformly construed, at least with respect to federal constitutional law. Otherwise, the policy behind uniform statutes is frustrated.

Another compelling reason for review by this Court is based on more practical considerations. Recent studies indicate that sports gambling proceeds may equal $70 billion a year. In the Dallas-Fort Worth area alone, as much as $10 million may be wagered in a single weekend of football. *Sports Illustrated* March 10, 1986 at 31. Certainly, it almost goes without saying that the State of Texas will be adversely effected by the *Adley* decision. Until the Texas Legislature next convenes its biannual meeting and drafts a new law, Texas will be helpless against the onslaught of professional gambling, which certainly cannot be expected to diminish after *Adley*.

But this is not solely a state problem. State law was nowhere implicated in the *Adley* decision. As a result, a conflict now exists between state interpretations of uniform penal statutes based upon federal constitutional law. This is not an academic conflict—it is a conflict with serious social consequences. Although gambling is a major problem in almost every urban area, professional sports gamblers can be expected to increase their operations in a state where, for the moment, no gambling promotion law exists. The citizens of the State of Texas have a significant interest in seeing that professional, organized gambling does not increase in their state simply because their Court of Criminal Appeals has needlessly struck down a necessary penal statute on a clearly erroneous interpreta-

tion of federal constitutional law.[9] The State of Texas respectfully moves this Honorable Court to review the erroneous *Adley* decision and resolve the conflict now existing on this serious social issue.

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CONCLUSION

It is respectfully submitted that for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated April 23, 1986

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[9] *Adley*, is, of course, an unfortunate precedent which could be used in those states which have not had occasion to interpret their similar gambling promotion statutes.

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ADLEY v. STATE
No. 0786-84

OPINION ON APPELLANT'S
PETITION FOR DISCRETIONARY REVIEW

Appellant was convicted for the felony offense of gambling promotion. V.T.C.A. Penal Code, § 47.03(a)(2). Appellant pled not guilty before the court and the court, based upon stipulated evidence, found appellant guilty and assessed a three year prison term, probated. The Dallas Court of Appeals affirmed his conviction in a published opinion. Adley v. State, 675 S.W.2d 240 (Tex.App. 5*th* 1984). We granted appellant's petition for discretionary review to determine whether the court of appeals erred in two respects.

Specifically, appellant alleges that the trial court reversibly erred in failing to grant his motion to quash wherein he alleged that the statutory language of "receiving a bet" was vague and that the allegation that he received a bet was subject to varied interpretation, thereby failing to give him requisite notice. He also challenges the sufficiency of the evidence to support his conviction, but because we believe that § 47.03(a)(2) is unconstitutionally vague and ambiguous, we find it unnecessary to reach that issue. We will reverse the court of appeals.

The court of appeals specifically held that § 47.03(a)(2), supra was not unconstitutionally vague and ambiguous. That court relied upon Powell v. State, 624 S.W.2d 818 (Tex.App.—Beaumont, no pet.) The holding in *Powell*, supra can be characterized as dicta since the defendant

was not charged with a violation of § 47.03(a)(2). We do not find the Beaumont Court of Appeals holding in *Powell* persuasive, nor is it controlling on this Court.[1]

The claim presented here centers upon a comparison of V.T.C.A. Penal Code § 47.02(a)(1) and § 47.03(a)(2). Appellant claims that the conduct of "receiving a bet," prohibited in § 47.03(a)(2) as a felony, and the conduct of "making a bet" prohibited in § 47.02(a)(1) as a misdemeanor, are functionally the same conduct. He contends an individual cannot determine whether his conduct constitutes a felony or a misdemeanor, thereby rendering the statute void. Appellant argues that, in order to avoid such a conclusion, this Court should interpret § 47.03(a)(2) as requiring *at least three parties* to the transaction, thereby distinguishing § 47.02(a)(1), which only requires two parties. We cannot accept appellant's argument that § 47.03(a)(2) requires three parties; we believe such an interpretation defies logic and ignores legislative intent. Nonetheless, we believe the legislature has failed to sufficiently define the conduct of "receiving a bet" so as to

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[1] We note that in the court of appeals the appellant directly and specifically argued in his ground of error No. 1 that § 47.03(a)(2) was unconstitutional. In his petition for discretionary review appellant, while framing his ground of error in different language, nonetheless incorporated ground of error No. 1 in his petition for discretionary review. While appellant urges the indictment is unconstitutionally vague, it is clear that if the indictment is unconstitutionally vague, then, so too is the statute, for the indictment tracks the statutory language.

The indictment charged, inter alia, that the appellant "did intentionally and knowingly receive a bet, by telephone, placed by Fred Cochran on the final result of a professional football game to be played between the Cleveland Browns and Philadelphia Eagles . . ."

limit law enforcement and prosecutorial discretion in prosecuting only the professional exploitive gambler under 47.03(a)(2).

This Court has not previously addressed the issue appellant raises. We have held that an indictment charging commission of conduct prohibited by § 47.03(a)(2) must allege the means used in receiving or recording a bet. Jeffers v. State, 647 S.W.2d 185 (Tex.Cr.App. 1981). Furthermore, in Smith v. State, 658 S.W.2d 172 (Tx.Cr. App. 1983) we held that a defendant was entitled to sufficient facts to give him precise notice of the offense for which he is charged. We also specifically refused to rule on the constitutionality of "making a bet", § 47.02(a)(1) and "receiving a bet", § 47.03(a)(2). We believe the time has come for this determination.

In 1974, the Texas Legislature enacted the Texas Penal Code, and in doing so, made various changes in the law pertaining to gambling. Prior to 1974, the Penal Code criminalized gambling in separate and distinct offenses for all the various forms of gambling.[2] The statutes were confusing to say the least. In enacting Chapter 47 of the new Code, the legislature sought to simplify the law.[3] More importantly, the legislature, for the first time, sought to decriminalize social gambling and provide minimal penalties for the individual who utilized the services of the professional gambler. See generally practice com-

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[2] See generally TEX.PENAL CODE ANN., art. 615, et seq (1925). The old penal code had over fifty separate sections regarding gambling.

[3] Texas Penal Code, A proposed revision, State Bar Committee; Com.Foward p. IV-V (West 1970).

mentary to Chapter 47, V.T.C.A. Penal Code, § 47.01, et seq.

In pertinent part, the statutes provide as follows:

"47.01 Definitions

"In this chapter:

"(1) 'Bet' means an agreement that, dependent on chance even though accompanied by some skill, one stands to win or lose something of value. . . .

". . . .

"47.02 Gambling

"(a) A person commits an offense if he:

"(1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest;

". . . .

"(b) It is a defense to prosecution *under this section*[4] that:

"(1) the actor engaged in gambling in a private place;

"(2) no person received any economic benefit other than personal winnings; and

"(3) except for the advantage of skill or luck, the risks of losing and the chance of winning were the same for participants.

"(c) An offense under this section is a Class C. misdemeanor.

". . .

"Section 47.03 Gambling Promotion.

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[4] All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.

"(a) A person commits an offense if he intentionally or knowingly does any of the following acts:

"....

"(2) receives, records, or forwards a bet or offer to bet;

"....

"(b) An offense under this section is a felony of the 3rd degree."

The Texas Legislature, in enacting the above-referenced Chapter 47, failed to define "make" or "receive" Therein lies the problem as the appellant sees it. Appellant argues that the notion of the existence of a "bet" implies an agreement. An agreement necessarily involves at least two parties. Appellant relies on the definition of receive, to-wit: "to come into possession of." Webster's Collegiate Dictionary (1977). Thus, appellant argues, that the receiver of a bet must receive an agreement entered into by *two other parties.* This notion ignores the reality of legislative history. To require the receiver of a bet to only be liable for receiving a bet made by two other parties is to limit the application of this section to a class of gambling that is non-existent. Moreover, we fail to see how a receiver of a bet made by *two other parties* can be classified as an exploitive gambler; the gambler whose conduct the legislature intended to forbid.

We believe appellant incorrectly isolates "receive" and "makes" without taking cognizance of what the intent of the legislature was in using this terminology. Section 47.03 defines and prohibits exploitive gambling. Practice Commentary Searcy and Patterson V.T.C.A. Penal Code, § 47.03. We agree with the State when it argues

that one can make and receive a bet simultaneously. For when one receives an offer to bet and accepts said offer, one becomes a party to an agreement, i.e., the maker of a bet. One can, through the generally understood meaning of this language, be both a maker and receiver of a bet. Therein lies the problem.

The legislature, in punishing the receiver of a bet, sought to punish the conduct which, under the old code, was defined as bookmaking. Art. 652a prohibited the offense of bookmaking. "Any person who takes or accepts or places for another a bet or wager of money . . .; or any person who offers to take or accept or place for another any such bet or wager . . . shall be guilty of bookmaking." Art. 652a, supra, (repealed). Thus, we believe the legislative intent in drafting § 47.03(a)(2) in its present form was to punish the act of bookmaking. 20 Tex. Jur. 3d § 1362; see also, Webster's Dictionary, supra, which defines bookmaking as "one who determines odds and *receives and pays off bets.*"

The old code did not distinguish between the social gambler and the commercial gambler. Nor was there any defense to gambling.[5] All gambling was prohibited. Thus, the broad language used to define bookmaking was basically inconsequential. While the language in the present code is synonymous with that in the old code, we find that it does not limit bookmaking to just the commercial

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[5] Interestingly, the proposed code did originally include the defense stated in § 47.02(b), supra, for *all* gambling offenses. This was deleted due to the objection that such a defense would make prosecution very difficult. Tape of Sub-committee Hearing on chapter 47. Sub-committee on Criminal Matters, March 7, 1973.

gambler. The legislature, in enacting § 47.03, sought to limit felony penalties to only those individuals who engaged in gambling commercially, or, as the Practice Commentary notes, the "exploitive gambler." By using language synonymous with the old bookmaking statute without limiting or explaining its application to § 47.03(a)(2), we find that the legislature has painted with too broad a brush.

A statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Connally v. General Const. Co., 296 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 323 (1926); Passmore v. State, 544 S.W.2d 399 (Tex.Cr.App. 1976); Baker v. State, 478 S.W. 2d 445 (1972); Ex Parte Chernosky, 153 Tex. Crim. 52, 217 S.W.2d 673 (1949).

A statute is void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1953), or if it "encourages arbitrary and erratic arrests and convictions." Papachristou, supra; Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066 (1937). Either is an independent ground. See also, Goocher v. State, 633 S.W.2d 860 (Tex.Cr.App. 1982); Bates v. State, 587 S.W. 2d 121 (Tex.Cr.App. 1979); McMorris v. State, 516 S.W. 2d 927 (Tex.Cr.App. 1974).

Clearly, in any betting situation, there are a minimum of two parties involved; one being the maker of the bet and the other the receiver. For example, A and B attend a football game. B asks A to enter into an agreement regarding the final result of the football game. B bets $25.00 that team X will win the game. A accepts B's offer. Once accepted, A and B have made a bet. Clearly, under the terms of § 47.02(a)(1), supra, B and A are both makers of a bet. Likewise, A has received B's offer to bet and, upon acceptance, has received a bet under the terms of § 47.03(a)(2). B's conduct is only punishable as a misdemeanor. A, having additionally received an offer to bet, is punishable as a felon. Applying this example to the indictment and stipulated facts in the instant case, appellant finds himself in the exact position as A. Due process prohibits such vagueness and arbitrariness.

We hold, therefore, that §47.03(a)(2), insofar as it prohibits receiving a bet, is unconstitutionally vague and unenforceable as a penal sanction. Accordingly, the judgments of the court of appeals and the trial court are reversed and the cause is remanded to the trial court for dismissal of the indictment.[6]

CAMPBELL, Judge

(Delivered November 6, 1985)
En Banc

White, J., concurs.

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[6] Given our holding that §47.03(a)(2) is unconstitutional, we need not determine whether the evidence was insufficient under § 47.03(a)(2) since no further prosecution may be had under a void statute.

ADLEY v. STATE
NO. 0786-84

DISSENTING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

In the petition for discretionary review we granted, appellant charges that the court of appeals ignored the crux of his contention concerning statutory construction and, instead, "answered an argument which the appellant never advanced (i.e., that § 47.03(a)(2) was unconstitutionally vague)." Petition, at 4. As I read the opinion of the court of appeals, the court overruled his ground of error complaining that the trial court erred in denying his motion to quash the indictment on grounds that its allegations are vague and ambiguous. It did not decide that the statute is constitutional. Adley v. State, 675 S.W.2d 240 (Tex.App. — Dallas 1984).

Traditionally, the last action this Court or any other judicious appellate court will take is to address a claim that a statute is unconstitutional. Of course we are presently witnessing that tradition being breached by expedient sua sponte attacks on legislative acts in disfavor, but still cling to the hope that they are but expressions of the moment, ending when the particular job is done.

Adhering to the traditional approach in deciding questions of constitutionality of statutes, I respectfully dissent.

CLINTON, Judge

(Delivered November 6, 1985)
EN BANC

App. 10

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS OF TEXAS

RE: Case No. 0786-84

STYLE: Adley, Ronald Gerald

February 26, 1986

On this day the State's Motion for Rehearing was denied. (Dissenting Opinion Judge Clinton joined by Judge McCormick)

COA# 05-83-00720-CR Thomas Lowe, Clerk

ADLEY v. STATE
NO. 0786-84

OPINION DISSENTING TO DENIAL OF STATE'S MOTION FOR REHEARING

In its motion for rehearing the State urges a construction of the statutes that would sustain constitutionality of V.T.C.A. Penal Code, § 47.03(a)(2). The majority disdains that approach, notwithstanding its antiquity in jurisprudence of practically every jurisdiction as well as this one. See 53 Tex.Jur.2d 277-278, Statutes § 184.

For reasons stated in my dissenting opinion on original submission we should take that approach and, having taken it, uphold validity of § 47.03(a)(2) on the construction given the statutes in my dissenting opinion in Dowdy & Dowdy v. State, — S.W.2d — (Tex.Cr.App., Nos. 039-85 & 040-85, delivered this day).

Because the majority causes the Court needlessly to strike down a statute intended and designed by the Legislature in exercise of its police power to advance significant public policy considerations pertaining to health, safety, peace and welfare of the citizens of this State, I dissent.

CLINTON, Judge

(Delivered February 26, 1986)
EN BANC

McCormick, J., joins

STATUTORY PROVISIONS

§ 47.01. Definitions
In this chapter:

(1) "Bet" means an agreement that, dependent on chance even though accompanied by some skill, one stands to win or lose something of value. A bet does not include:

(A) contracts of indemnity of guaranty, or life, health, property, or accident insurance; or

(B) an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest.

* * * *

§ 4702. Gambling

(a) A person commits an offense if he:

(1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest;

(2) makes a bet on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or

(3) plays and bets for money or other things of value at any game played with cards, dice, or balls.

(b) It is a defense to prosecution under this section that:

(1) the actor engaged in gambling in a private place;

(2) no person received any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(c) It is a defense to prosecution under this section that the actor reasonably believed that the conduct was permitted under the Bingo Enabling Act.

(d) An offense under this section is a Class C misdemeanor.

§ 47.03. Gambling Promotion

(a) A person commits an offense if he intentionally or knowingly does any of the following acts:

(1) operates or participates in the earnings of a gambling place;

(2) receives, records, or forwards a bet or offer to bet;

(3) for gain, becomes a custodian of anything of value bet or offered to be bet;

(4) sells chances on the partial or final result of or on the margin of victory in any game or contest or on the performance of any participant in any game or contest or on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or

(5) for gain, sets up or promotes any lottery or sells or offers to sell or knowingly possesses for

transfer, or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery.

(b) An offense under this section is a felony of the third degree.

MOTION TO QUASH

The pertinent allegations appearing in Adley's motion to quash the indictment filed in the trial court below are as follows:

V.

Sections 47.01, 47.02, and 47.03 are unconstitutionally vague, uncertain, and indefinite since a person of common and ordinary intelligence cannot know, and must guess and speculate as to the meanings of the terms "bet" and "receive", as used in said sections, since those terms broadly encompass innocent and legal activity.

VI.

Sections 47.02(a)(1) and 47.03(a)(2) are unconstitutional because they are overly broad in that they fail to place a person of common and ordinary intelligence on notice of what acts and actions are prohibited so that he may know how to conform his conduct to the law.

VII.

Sections 47.02(a)(2) are unconstitutional, on their face and as applied in this case, because they each proscribe the same conduct, without requiring fewer or more facts to establish a violation of either section, thus allowing the State, acting through law enforcement officials and prosecutors, to select with total discretion whether to charge and prosecute an individual under either of these statutes. Given the disproportionate consequences of prosecution and

> conviction under the two sections, the statutes violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

(R.I.[Transcript of Trial Papers]-10). The trial court denied the motion, indicating its ruling on the face of the motion. (R.I-12).

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1759

In The
Supreme Court of the United States
October Term, 1985

THE STATE OF TEXAS,

Petitioner,

v.

RONALD GERALD ADLEY,

Respondent.

BRIEF IN OPPOSITION

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

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85-1759

QUESTIONS PRESENTED

The questions presented, as formulated by the Petitioner, are:

I.

Does the phrase "receive a bet" in the Texas gambling promotion statute, when measured by common understanding and practice, provide adequate warning and fair notice to persons of ordinary intelligence as to what conduct is proscribed?

II.

Is the phrase "receive a bet" in the Texas gambling promotion statute, when measured by common understanding and practice, sufficiently distinct from the phrase "make a bet" in the lesser offense of gambling so as to prevent arbitrary arrests and convictions?

The questions presented, as formulated by the Respondent, are:

1.

Whether the holding of the Texas Court of Criminal Appeals in this case is founded upon adequate state grounds, such that no federal issue is presented?

2.

Whether "receiving a bet," as used in § 47.03(a)(2) of the Texas Penal Code, is vague under the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES

Ronald Gerald Adley, the Respondent

The State of Texas, the Petitioner

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No. 85-1759

In The
Supreme Court of the United States
October Term, 1985

THE STATE OF TEXAS,

Petitioner,

v.

RONALD GERALD ADLEY,

Respondent.

BRIEF IN OPPOSITION

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

RONALD GERALD ADLEY, Respondent, files this Brief in Opposition to the Petition for Writ of Certiorari (hereafter "Petition") filed herein by the State of Texas, Petitioner.

OPINIONS BELOW

The Petitioner's recitations respecting the opinions below are correct. See Rule 34.2 of the Rules of this Court.

JURISDICTION

The Petitioner's factual jurisdictional recitations are correct, as is the recitation that 28 U.S.C. § 1257(3) confers jurisdiction upon this Court to hear cases involving the Constitution of the United States. *Petition* 2.

Because the Respondent claims that this case was decided by the lower court upon a state ground, independent of the Constitution of the United States, he disagrees that this Court properly has jurisdiction to hear the case under 28 U.S.C. § 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions involved are included in the *Petition*. See Rule 34.2, *supra*.

———o———

STATEMENT OF THE CASE

Ronald Gerald Adley was convicted of receiving a bet, a violation of § 47.03(a)(2).[1] By a pretrial motion to quash the indictment, he challenged the validity of the indictment on eight specified grounds, six of which were predi-

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[1] Section 47.03(a)(2) proscribes receiving, recording, and forwarding bets. Only the "receiving" portion of the statute is implicated in this case.

cated upon the unconstitutionality of § 47.03(a)(2).[2] That motion was overruled. The issues raised in that motion formed the crux of his appeal in the Texas courts.

The Texas Court of Appeals recognized the Petitioner's attack upon the indictment "on the grounds that it was unconstitutionally vague, and overruled the contention without discussion on the authority of *Powell v. State*, 624 S.W.2d 818 (Tex.App.—Beaumont 1981, no pet.), and *State v. Koo*, 647 P.2d 889 (Okla.Cr.App.1982), *cert.den.*, 459 U.S. 1036 (1982). That court did not intimate whether it perceived the Petitioner's attack to be grounded upon state or federal constitutional grounds.

On discretionary review, the Texas Court of Criminal Appeals specifically considered that part of the Petitioner's attack upon the constitutionality of § 47.03(a)(2) centering upon a comparison of §§ 47.02(a)(1) and 47.03(a)(2), and his claim that because the conduct proscribed by both sections are functionally the same such that an individual cannot distinguish whether his conduct constitutes a violation of one section or the other, § 47.03(a)(2) is vague and void. *Adley v. State, Petition,* App. 2. The Court agreed with the Petitioner, and declared "that § 47.03(a)(2), *insofar as it prohibits receiving a bet,* is unconstitutionally vague . . ." *Id.* at 8 (emphasis added).

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[2] Only one of these grounds invoked the Fourteenth Amendment.

REASONS FOR NOT GRANTING THE WRIT

1.

The Holding of the Court of Criminal Appeals in This Case is Based on State Grounds, Independent of Federal Constitutional Law, and Thus Presents No Federal Question.

The Petitioner posits its claim for relief upon the existence of a federal question involving the interpretation of "gambling promotion" laws and a purported conflict between several jurisdictions respecting the interpretation of those laws. *Petition* 4-5, 9-10. We submit that there is no federal question involved in this case, and that the "conflicts" upon which the Petitioner relies are spurious.

No Federal Question Is Involved In This Case

At the outset, it is important to remember that whenever the construction of a state statute is implicated, "this Court ordinarily accepts the construction given a state statute in the local courts and also presumes that the statute will be construed in such a way as to avoid the constitutional question presented." *Baggett v. Bullitt*, 377 U.S. 369, 375 (1964).

The issue before the Court of Criminal Appeals was whether the receiving-a-bet portion of § 47.03(a)(2) could coexist with § 47.02(a)(1) under the Texas rules of statu-

tory construction;[3] it was that issue which the Court of Criminal Appeals decided. That court identified the Respondent's contention thusly:

> Specifically, [the Respondent] argues that the trial court reversibly erred in failing to grant his motion to quash wherein he alleged that the statutory language of "receiving a bet" was vague and that the allegation that he received a bet was subject to varied interpretation, thereby failing to give him the requisite notice."

Petition, App. 1. The court went on to describe the issue in the following terms:

> The claim presented here centers upon a compari- of . . . §§ 47.02(a)(1) and 47.03(a)(2). [Adley] claims that the conduct of "receiving a bet," prohibited in § 47.03(a)(2) as a felony, and the conduct of "making a bet" prohibited in § 47.02(a)(1) as a misdemeanor, are functionally the same conduct. He contends that an individual cannot determine whether his conduct constitutes a felony or a misdemeanor, thereby rendering the statute void.

Id. at 2.

The Court of Criminal Appeals concluded that because the act of receiving a bet proscribed by § 47.03(a)(2) is indistinguishable from the conduct denounced in § 47.02(a)(1), § 47.03(a)(2) is unconstitutionally vague. *Id.* at 8. In reaching this decision, that court was concerned only with whether the prohibition in § 47.03(a)(2) against receiving a bet could be reconciled with the offense of making a bet,

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[3] The Petitioner's assertion that Mr. Adley "squarely implicated the United States Constitution in his motion to quash", *Petition* 6, n. 2, is disingenuous. Although the Fourteenth Amendment was cited in one paragraph of the motion, the majority of the eight issues raised and the overall thrust of the motion clearly challenged the statute on grounds that it was irreconcilable with § 47.02(a)(1) under state grounds, specifically, pursuant to the accepted Texas rules of statutory construction.

as denounced in § 47.02(a)(1)—not with whether the offense of receiving a bet, as contained in § 47.03(a)(2), was vague per se. Finding that the two statutes were irreconcilable, the court was obliged to declare one of them unconstitutional.

The basis for the court's decision to declare the receiving-a-bet portion of § 47.03(a)(2) unconstitutional is Texas law, not federal constitutional law, although the latter is implicated to the extent applicable Texas law utilizes principles of federal constitutional law. The Texas penal code declares that crimes shall be defined and construed "to give fair warning of what is prohibited and of the consequences of violation,"[4] and to "guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons accused . . . of offenses."[5] These declarations codify the expressions of this Court in *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972), and cases therein cited. Thus, although the Court of Criminal Appeals quoted from *Papachristou* when reciting these principles, this Court should presume, under *Baggett v. Bullitt, supra,* that the Court of Criminal Appeals was construing § 47.03(a)(2) consistent with Texas law, and not applying federal constitutional law.[6]

That the Court of Criminal Appeals declared § 47.03 (a)(2) unconstitutional instead of § 47.02(a)(1), provides

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4 TEX.PENAL CODE ANN. § 1.02(2) (Vernon 1974).

5 *Id.* § 1.02(5).

6 In his brief filed with the Court of Criminal Appeals, Adley specifically grounded his argument that § 47.03(a)(2) was unconstitutionally vague upon the quoted provisions of the Texas penal code, coupled with Texas decisions construing those provisions. *Appellant's Brief* [on petition for discretionary review], pp. 8-13.

further evidence that *Adley* is grounded upon Texas law. Confronted with two statutes dealing with the same subject matter, but dissimilar in their respective treatment of that subject, the Court of Criminal Appeals followed the customary Texas practice of attempting to harmonize the statutes under the *in pari materia* doctrine. See *Alejos v. State,* 555 S.W.2d 444 (Tex.Cr.App.1977). Unable to do so because of the disparate punishments provided for each statute and due to the existence of a defense applicable only to § 47.02(a)(1) conduct, that court was obliged to then apply the Texas rule of statutory construction that a general statutory provision must yield to a specific provision dealing with the same subject matter where the two are in conflict. *Ex parte Holbrook,* 606 S.W.2d 925 (Tex.Cr.App. 1980); *Valdez v. State,* 553 S.W.2d 110 (Tex.Cr.App.1977). Since federal constitutional law, and more particularly due process considerations, does not control which of two inconsistent state statutes must be vitiated, the only basis upon which the Court of Criminal Appeals could have declared the "receiving" portion of § 47.03(a)(2) unconstitutional was pursuant to Texas law.

The simple fact, which the Petitioner has ignored, is that the Court of Criminal Appeals did not test the "receiving" portion of § 47.03(a)(2) against the federal due process yardstick, but instead resolved the conflict between the "receiving" portion of § 47.03(a)(2) and § 47.02(a)(1) solely on the basis of applicable Texas rules of statutory construction. Thus, there is an adequate basis for the decision of the Court of Criminal Appeals founded in Texas law, independent of federal constitutional issues, obviating the need for this Court to review this case.

2.

The Alleged Conflicts Between the Decision Below and Decisions by Other Courts Regarding Gambling Statutes is Insufficient to Warrant Review by This Court.

The Petitioner asserts that the decision in this case conflicts with decisions construing "almost identical" statutes, and that this Court should review this case to establish uniformity among the states with respect to gambling laws. *Petition* 8-9, 12-14. This argument fails for two reasons. First, the 'other decisions' are not in conflict with the decision of the Texas Court of Criminal Appeals. And, second, this Court is not charged with responsibility of assuring uniformity among the states with respect to the interpretation of state statutes where federal constitutional principles are not implicated.

The Oklahoma and Wisconsin gambling statutes involved in *United States v. Hines,* 696 F.2d 722 (10th Cir. 1982), *State v. Koo,* 647 P.2d 889 (Okla.Cr.App.1982), and *State v. Vlahos,* 50 Wis.2d 609, 184 N.W.2d 817 (1971), were attacked specifically on the ground that they were unconstitutionally vague *per se. United States v. Hines, supra,* 696 F.2d at 726-727; *State v. Koo, supra,* 647 P.2d at 892; *State v. Vlahos, supra,* 184 N.W.2d at 821. In none of those cases did it appear from the courts' opinions that the statutes in question were being attacked because they conflicted with other statutes similar to Texas' § 47.02 (a)(1). Because the courts in the cited cases were not called upon to decide the issue involved in this case, the holdings in those cases cannot be said to be in conflict with the opinion of the Texas Court of Criminal Appeals in this case.

To the extent the *Vlahos* opinion notes a distinction between "making a bet" and "receiving a bet," 184 N.W.2d at 820-821, upon which the Petitioner heavily relies, several observations are appropriate. First, the *Vlahos* court did not consider the effect of the defense provided in § 47.02(b) not applying to § 47.03(a). This dissimilar legislative treatment of gambling was a significant factor to the Texas Court of Criminal Appeals in the decision rendered in this case. *Adley v. State*, — S.W.2d — (*Petition*, App. 6). Second, that court quite obviously did not evaluate the claim presented in this case that "receiving a bet" was vague under both the Texas penal code and Texas' rules of statutory construction. The Petitioner's claim that *Vlahos* dealt with the "ultimate contention that 'making' a bet and 'receiving' a bet were the same thing," *Petition* 10, is a superficial attempt to draw a critical parallel between the two cases that does not exist.

In the Petitioner's view, "the Texas Court of Criminal Appeals' opinion is wrong," while the Supreme Court of Wisconsin possesses significantly greater wisdom in divining the meaning of gambling statutes. It is not surprising that we are not informed of why this comparative evaluation should be accepted since *Vlahos* is admittedly predicated upon the dubious assertion that "gambling . . . is unquestionably criminal conduct." *State v. Vlahos*, *supra*, 184 N.W.2d at 821. The legislatures of the many states that have enacted lotteries and other forms of commercial gambling, as well as Congress, which taxes gambling, certainly do not share the Wisconsin Supreme Court's draconian views about gambling being unquestionable criminal conduct. Given this attitude about gambling, it is altogether understandable that the Wisconsin Supreme

Court would, as it did, uphold a gambling statute because it sought to punish a person based only his status, i.e., being a bookmaker, *Vlahos, supra,* 184 N.W.2d at 821, despite the contrary expressions of this Court. *Papachristou v. Jacksonville, supra,* 405 U.S. at 162-164.

In any event, the Petitioner's suggestion, advanced without benefit of any authority, that review of this case is appropriate in order that this Court might establish a uniform policy with respect to state gambling statutes is meritless. The wisdom of a state statute rationally related to a legitimate governmental interest, or the wisdom of a state court's construction of such a statute, is not a matter over which this Court has the power to act, except when the statute infringes upon rights guaranteed by the federal constitution. *Dandridge v. Williams,* 397 U.S. 471 (1970). The mere disagreement between the highest courts of Texas and Wisconsin regarding the propriety of their states' gambling laws does, without more, provide a basis for this Court's intervention in those state's activities.

3.

The Social Ills of Gambling Perceived by the Petitioner Do Not Merit Review of This Case.

Relying on *Sports Illustrated,* the Petitioner seeks review of this case because the decision by the Texas Court of Criminal Appeals leaves "Texas helpless against the onslaught of professional gambling." *Petition* 14.

The Petitioner's rhetorical flourish proceeds from the fallacious assumption recited in *Vlahos* that gambling is inherently criminal and that it must be punished. We need look no further than the many states in which commercial

gambling is legislatively countenanced — indeed, where commercial gambling is a function of state government in the form of state lotteries, for conclusive proof to rebut the Petitioner's assertions.

To the extent the Petitioner seeks review of this case to protect against the social ills it perceives accompany gambling, we believe it proper and important to suggest that the Court consider the fundamental question of whether Congress has pre-empted the states from outlawing gambling by virtue of the taxes it has imposed on that activity. For almost as long as this country has existed, it has been well-settled that the states cannot frustrate the efforts of Congress in carrying out its constitutional duties. *McCulloch v. Maryland,* 4 Wheat. 316 (1819). Once Congress acts within its constitutional ambit, no state may thereafter frustrate or impede either the spirit or the letter of that law. *International Shoe Company v. Pinkus,* 278 U.S. 261 (1929).

Long before the enactment of the Texas laws criminalizing certain forms of gambling, Congress exercised its constitutional authority to impose taxes, U.S.Const. art. 1, upon gambling activities. 26 U.S.C. § 4401 et seq. Those laws are of unquestioned validity. *United States v. Kahriger,* 345 U.S. 22, 31 (1953). The obvious purpose of these statutes was to increase the nation's revenues. *United States v. D.I. Operating Company,* 362 F.2d 305, 308 (9th Cir. 1966). By taxing gambling activities, Congress preempted the states from acting in the area of gambling in a manner contrary to the intent of Congress. Thus, although it may be an appropriate exercise of state police power to outlaw gambling, the exercise of that power is im-

permissible to the extent it eliminates the basis for the federal taxes on gambling or frustrates the congressional objective to secure those taxes. *Castle v. Hayes Freight Lines,* 348 U.S. 61 (1954).

If the Petitioner's figures are accurate, the $10 million wagered each football weekend in the Dallas-Fort Worth area generate $200,000 in tax revenues to the United States. The potential loss of this revenue is a "practical consideration" which must be considered if review of this case is granted.

4.

The "Receiving-a-Bet" Portion of § 47.03(a)(2) is Void for Vagueness Under the Fourteenth Amendment.

Succinctly stated, the holding of the Texas Court of Criminal Appeals that since "making" and "receiving" bets are functionally the same conduct, and are punishable by both felony and misdemeanor penalties, it may not be left to the unfettered discretion of the police, prosecutors and judiciary to determine who shall be punished as a felon or a misdemeanant for doing the same act. The decision is further grounded on the specific language of § 47.02(b) that it is a defense to the misdemeanor conduct, but not to the felony conduct, that: (1) the actor engaged in gambling in a private place; (2) no person received any economic benefit other than personal winnings; and (3) except for the advantage of skill or luck, the risk of losing and the chance of winning were the same for both participants.

Under the general principles of constitutional law enunciated by this § 47.03(a)(2); to the extent it prohibits

receiving a bet, is unconstitutionally vague. Viewed in conjunction with § 47.02(a)(1), it offends several values implicit in the vagueness test: First, it may trap the innocent by not providing fair warning; and, second, it impermissibly delegates basic policy matter to policemen, prosecutors, judges, and juries for resolution on an ad hoc basis, with attendant dangers of arbitrary and discriminatory application. See *Grayned v. City of Rockford,* 408 U.S. 104 (1972). Accepting the fact that the conduct penalized by both statutes is the same, police and prosecutors may deprive an individual of valuable defenses by simply indulging in the fiction that the person "received" the bet rather than "made" the bet. It is submitted that a reasonable person reading § 47.02 could conclude that no criminal penalty whatsoever would attach to his conduct if it met the requirements of the affirmative defense provided in subsection b. The Respondent, however, was deprived of the opportunity to present such defense by the choice of the charging authorities. In light of such statutory imprecision, when the language of both statutes are read together, they do not provide adequate warning to anyone, they do not contain sufficient guidelines for law enforcement officials to properly apply them, nor do they limit courts and juries in applying the laws or in punishing violations of those laws.

This Court has frequently applied the doctrine of vagueness to incorporate the notion of fair notice or warning, requiring legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement. See *Smith v. Goguen,* 415 U.S. 566 (1974). The Petitioner argues that since the statutes herein do not implicate

First Amendment considerations, the void for vagueness doctrine should be relaxed. *Petition* 7-9. While the vagueness doctrine should be applied more strictly in a First Amendment case than in most other contexts, this case involves a criminal statute which should be narrowly construed, thus calling for a strict application of the doctrine. *United States v. Laub*, 385 U.S. 475 (1967). Further, crimes are not to be created by inferences drawn from the statutes by authorities with the responsibility of enforcement. Neither may they be construed nunc pro tunc. *United States v. Laub, supra.* Under the foregoing gambling statutes, a person in Texas could be reasonably well assured that his conduct was either a misdemeaner or would have no criminal liability whatsoever based on a good faith reliance on the plain language of § 47.02(b), but he nevertheless could be prosecuted as a felon for what he believed was either innocent or misdemeanor conduct at the complete discretion of the charging official. The commands of § 47.03(a)(2) are not only vague and undefined, they inexplicably contradictory and actively mislead the reader. See *United States v. Laub, supra.* On the other hand, § 47.02 (a)(1) is a narrow and precise statement of what is prohibited and what is permitted. Such a statute, by virtue of its precision, operates to lull a potential defendant into a false sense of security, giving him no reason to suspect that conduct he reasonably believes meets the requirements of the law will be punished under another, broader law. To the extent this occurs because of the judicial construction of the law, it constitutes unforseeable judicial enlargement of a criminal statute and is prohibited when applied retroactively. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

We submit that the conclusion reached by the Court of Criminal Appeals, although it was predicated upon state

grounds, was correct under federal constitutional standards as set out in *Papachristou* and *Thornhill v. Alabama*, 310 U.S. 88 (1940). Section 47.03(a)(2), construed with § 47.02 (a)(1), fails to give fair notice of the conduct forbidden and encourages arbitrary and erratic arrests and convictions. Accordingly, it is unconstitutionally vague under the federal constitution.

CONCLUSION

For the reasons stated herein, the Petition filed in this case should be denied.

Respectfully submitted,

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